

BRB No. 10-0279 BLA

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|--------------------------------|---|-------------------------|
| TINA CREECH |) | |
| (Widow of TIM CREECH) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| R&B COAL COMPANY, INCORPORATED |) | DATE ISSUED: 12/29/2010 |
| |) | |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order Denying Survivor's Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Survivor's Benefits (08-BLA-05330) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge)

on a claim¹ filed on February 19, 2007, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The administrative law judge found that claimant established that the miner had at least fifteen years of coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied.

On appeal, claimant contends that the evidence establishes the existence of pneumoconiosis under Section 718.202(a)(4) and death due to pneumoconiosis under Section 718.205(c).² Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive brief on the merits of the appeal.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption in a survivor's claim that a miner died due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order dated July 21, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of the amendments. In response, the Director

¹ Claimant is the widow of a miner, who died on July 30, 2006. Director's Exhibit 10. The miner filed his initial claim for benefits on July 30, 1997, which was denied by the district director on February 17, 1998, for failure to establish any element of entitlement. Director's Exhibit 1. The miner filed a second claim on October 3, 2001, which was denied by Administrative Law Judge Daniel F. Solomon on November 17, 2004. This denial was affirmed by the Board on July 13, 2005, and no further action was taken on the miner's claim. Claimant filed her survivor's claim on February 19, 2007. Director's Exhibit 2.

² Claimant also challenges the administrative law judge's denial of benefits in the miner's claim. We will not consider claimant's arguments based on the denial of the miner's claim, however, because the Board affirmed the denial of the miner's claim on July 13, 2005, and the record does not reflect that the miner's claim was further pursued. *See* 20 C.F.R. §§725.310; 802.205.

contends that, based on the filing date of the survivor's claim, the amendments are applicable. Further, the Director contends that, inasmuch as fifteen years of coal mine employment were established, the case must be remanded for consideration of whether the miner was totally disabled under Section 718.204(b), in order to determine if claimant is entitled to the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). The Director further contends that consideration under Section 411(c)(4) requires the administrative law judge to allow the parties the opportunity to submit additional evidence consistent with the evidentiary limitations to address the change in law. *See* 20 C.F.R. §§725.414, 725.456. Employer responds, contending that application of the amendments would not change the outcome of this case, as the evidence in the miner's claim did not establish total disability. Employer also contends that application of the amendments would not change the outcome of this case, because the administrative law judge found that the miner did not have pneumoconiosis.

We agree with the Director that, based on the filing date of this claim and the finding that the miner had fifteen years of coal mine employment, claimant may be entitled to the presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4), if claimant establishes that the miner was totally disabled. Claimant must, therefore, be afforded the opportunity to submit evidence showing that the miner was totally disabled, an avenue of entitlement that was not available in a survivor's claim prior to the recent amendments. *See* 30 U.S.C. §921(c)(4). This survivor's claim is, therefore, remanded for consideration of the issue of total disability pursuant to Section 718.204(b). On remand, the administrative law judge must also determine whether the miner's fifteen years of coal mine employment were underground, or performed in conditions "substantially similar to conditions in an underground mine[.]" in order to be *qualifying* under Section 411(c)(4). *See Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988). If the administrative law judge finds that claimant is entitled to invocation of the Section 411(c)(4) presumption, he must then determine whether employer has rebutted the presumption.

The administrative law judge must allow all parties the opportunity to submit additional relevant evidence. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). The submission of any additional evidence must be in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).³

³ Because we vacate the administrative law judge's decision denying benefits and remand the case for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), we will not consider claimant's arguments on appeal.

Accordingly, the administrative law judge's Decision and Order Denying Survivor's Benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge